Commonwealth of Massachusetts
State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851

CONFLICT OF INTEREST OPINION
EC-COI-92-3

FACTS:

You are a state employee interested in exploring the possibility of employment with the federal government. You have provided the following background. You are currently responsible for certain litigation on behalf of the Commonwealth. This litigation has been undertaken jointly with two agencies of the federal government, Agency X and the Department of Justice (the Department). A settlement agreement has been entered into with a portion of the defendants. An allocation agreement has also been signed between the Commonwealth and Agency X which establishes the formula for dividing the monies recovered in settlement. You inform us that this allocation agreement does not require Court approval. As we understand it, the allocation agreement involves the use of a formula to divide the proceeds from the litigation. You state that, to your knowledge, this allocation agreement would not be re-negotiated, except as an extraordinary event, although the absolute dollar figure may change if additional proceeds are added to the settlement.

Until recently, it appeared likely that the litigation would soon be completed. However, a third-party recently challenged the settlement agreement and an appeal was filed in the First Circuit. No date for oral argument has been set and the case could continue for months without a final decision on the validity of the settlements. You maintain that the financial issues and "interests" of the public will have been settled by written agreement on file with the Court. It is your opinion that only in the event that the governmental entities lose the appeal, and the settlements are thereby overturned, is there any expectation that the "financial interests" of the public and the settlement agreements would have to be re-opened for negotiation.

You have also informed us that the litigation has not involved any United States Attorney's Office, nor will any such office receive any part of the settlement proceeds under any scenario. To your knowledge, all United States Attorney's Offices conduct hiring practices independent of the Department although apparently routine background checks are handled in Washington. To your knowledge, the Department does not exercise oversight or control over the hiring or daily operations of United States
Attorney's Offices. You suggest that there is not the same unity of interest or control that characterizes, for example, the role of a parent corporation that would reasonably associate these two offices as a single "person or organization."

With your consent, this Commission contacted the United States Attorney's Office in Boston in an effort to understand the role of the Department in the hiring process. We were informed that the Department and the Federal Bureau of Investigation conduct a background check on all applicants to United States Attorney's positions. The Department's input into the hiring decision is limited, however, to a veto of those persons who do not pass the background check. The Department otherwise plays no role in recommending whether a candidate is hired. The candidate must, however, receive a commission from the United States Attorney General, and, as we understand it, can be terminated only by the Department, not by the local United States Attorney.

QUESTION:

Given the above facts, what restrictions does the conflict of interest law place on you if you should seek employment with the federal government at this time?

ANSWER:

The conflict of interest law would require you to make written disclosures to your appointing authority prior to contacting federal agencies under certain conditions, as described below.

DISCUSSION:

You are a state employee for purposes of the conflict of interest law. As such, two provisions of the conflict of interest law, §6 and §23, apply to you in your current situation.

Section 6

Section 6 of c. 268A prohibits a state employee from participating[1/] in any particular matter[2/] in which he, an immediate family member, or any business organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a direct or a reasonably foreseeable financial interest. You should note that the financial interest may be of any size, and may be either positive or negative. *See, e.g., EC-COI-91-14*.

Section 6 further provides, however, that:

> Any state employee whose duties would otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest, and the appointing official shall thereupon either
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> 1. assign the particular matter to another employee, or
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> 2. assume responsibility for the particular matter, or
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> 3. make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the Commission for a period of six years.

The reasons for the §6 disclosure/determination process were articulated in *Commission Advisory No. 14* (Negotiation for Prospective Employment). *Advisory No. 14*, quoting from the Report of the Special Committee on the Federal Conflict of Interest laws of the Association of the Bar of the City of New York, *Conflict of Interest and Public Service* 280 (1960), stated that:

> [t]he risk is not bribery through the device of job offers; the risk is that of sapping governmental policy, especially regulatory policy, through the nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter around, the greatest public risks arising from post-employment conduct may well occur during the period of government employment.

The Commission has treated prior violations of this section as a serious offense. Even where no evidence is found that the state employee has acted to provide any special treatment to the prospective employer, a fine will be imposed if the state employee has entered into negotiations with that prospective employer while participating in a matter affecting its financial interests. *See Disposition Agreement, Docket No. 421, 1991* ($500 fine); *see also 1986 SEC 260, 262* ("Section 6, like many of the other sections of G.L. c. 268A, is intended to prevent any questions arising as to whether the public interest has been served with the single-minded devotion required of public employees"); *1986 SEC 253, 255* (these disclosure provisions are more than mere technicalities because they protect the public interest from potentially serious harm. The procedures are designed to prevent an appointing authority from making an uninformed, ill-advised or badly motivated decision).

In the present case, you participate as a state employee in litigation in which at least two federal agencies have an interest. Consequently, issues under this section would need to be addressed if you were to negotiate for employment with the federal government while the litigation is ongoing or the settlement agreement remains open to challenges. *See EC-COI-82-8; Commission Advisory No. 14*.

Several points should be addressed here. First, §6 draws a clear distinction between the financial interests of a "business organization" in which the state employee is serving as an officer, director, trustee, partner, or

employee, and those financial interests of a "person or organization" with whom the state employee is negotiating for prospective employment. *See* Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B. U. L. Rev. 299, 357-358 (1963) ("there is no evident justification . . . for reading [the terms person or organization] to mean a person engaged in business or a business organization." Emphasis in original).[3/] This distinction, of course, makes it possible to cover a broader class of entities in the negotiation for employment context — including governmental agencies and charitable entities, for example. Consequently, our focus in the present case is whether the federal government is a person or an organization (or organizations) within the meaning of this section.

Second, a "person" is defined, by statute, as a corporation, society, association or a partnership. G.L. c. 4, §7, cl. twenty-third (definitions of statutory terms; statutory construction). The term does not, however, include either governmental subdivisions or governmental agencies. On the other hand, an "organization" does include governments, governmental subdivisions, and governmental agencies, in addition to corporations, business trusts, estates, partnerships or associations, two or more persons having a joint or common interest, or any other legal or commercial entity. *Black's Law Dictionary*, Fifth Edition, 1979. Consequently, in the present case, §6 is implicated because the federal government is considered an organization within the meaning of this section even though it is neither a business organization nor a person.

Third, the Commission concludes that the entire federal government is not a single organization for purposes of this section. A contrary position would mean that any state employee who has any dealings with a branch or division of the federal government, no matter how minimal the dealings, no matter how distinct the agency, and no matter how far removed from the particular matter in question, would find that §6 is implicated by each and every contact concerning prospective employment made with every other branch of the federal government. For the reasons stated below, such a result is both unreasonable and unnecessary.

The conflict of interest law must be given a workable meaning. *Graham v. McGrail*, 370 Mass. 133, 140 (1976). In light of the fact that the definition of an organization can be applied to each separate governmental entity without difficulty, and in light of the distinctions already made by this Commission between various agencies of state governments, we find that the federal government is not a single organization within the meaning of §6. *See, e.g., EC-COI-91-5; 90-5* (for purposes of §4 of the conflict of interest law, the state agency served by a special state employee was the Board with which he had contracted, not the supervisory agency within which the Board was located); *85-35* (DSS special state employee could not receive compensation in connection with matters which were referred by DSS; however, that same restriction would not apply to clients referred from DMH, even though both DSS and DMH are part of the same Secretariat); *84-146* (for purposes of determining the "governmental body" under §5(e), the governor's office is a distinct agency from the various Secretariats . . . the critical focus is on the name and organizational location of the agency, not on the functional accountability of one agency to another . . . in view of the intervening state agency layers between the budget bureau, an agency within Administration and Finance, and the governor's office, the governmental body is the governor's office, rather than the entire executive administration).[4/]

The above cases illustrate that the Commission has, from time to time, considered how closely allied one agency is to another for purposes of determining agency separateness when applying various sections of c. 268A. In light of the above, the Commission concludes that, for purposes of the employment negotiation context under §6, it will look to whether one agency of government has substantial control over the hiring process of another agency. If substantial control exists, the two agencies will be treated as if they are a single organization for purposes of §6.

In the present case, the Department includes, among other divisions, the Federal Bureau of Investigation, the Office of Immigration and Naturalization, and the United States Attorneys' Offices. Each of those agencies has a distinct function and separate mission from the Department although each agency ultimately reports to the Department. Accordingly, the Commission finds that each such agency should be treated as a separate organization for hiring purposes unless the Department can be shown to have substantial control over the hiring process within each of these agencies, whether by statute or by actual practice.[5/]

As we understand the facts in the present case, the Department has little input into the hiring practices of a given United States Attorney's Office. Accordingly, the Commission finds that United States Attorney's Offices are separate and distinct organizations from the Department for purposes of the §6 employment negotiation

context. This conclusion results from the fact that the Department does not have substantial control over the hiring of United States Attorneys. We find that the separation of hiring functions protects the public's interest from the harm contemplated by the restrictions established in §6.

Consequently, employment negotiations with Agency X or the Department would raise issues under this section because both of those agencies have an interest in the litigation in question. On the other hand, negotiations for employment with other federal agencies (i) which do not have a interest in the litigation, or (ii) whose hiring procedures are not substantially controlled by Agency X or the Department, will not raise issues under this section.

However, in order for §6 to be applicable it is not enough that the agency in question has an interest in the litigation. The interest must be a financial one. For the reasons stated below, we conclude that individual governmental agencies involved in litigation have a financial interest in that litigation even if the agency itself will not be receiving the benefit of the proceeds derived from the litigation.

In the present case, you maintain that none of the agencies in question will share in the proceeds of the litigation because all monies will ultimately be deposited into the federal treasury. You have also suggested that the allocation agreement signed by the agencies in question, in effect, insulates the agencies from any financial interest. That agreement splits the litigation proceeds among the various agencies by way of a set formula. In other words, you maintain that the allocation formula eliminates any "financial interest." However, we conclude that any federal agency actively involved in pursuing the litigation has a direct or a reasonably foreseeable financial interest in the outcome of that litigation because the federal government has such an interest. The federal government's financial interest will be attributed to the agency or agencies actively involved in pursuing that litigation on the federal government's behalf. The federal government would receive nothing unless the agency or agencies involved pursued the litigation. Accordingly, §6 is implicated in the present case and would require a public disclosure once you reach the point of negotiations with an interested federal agency. (A different rule applies concerning the application of §23(b)(3) as described below.) Based upon your facts, the two agencies which trigger the §6 disclosure requirements are Agency X and the Department.

Section 23

In addition to the above, §23(b)(3) prohibits a state employee from acting in a manner which would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. This is the so-called "appearances" section of c. 268A. The appearance of a conflict of interest can be dispelled by making a full written disclosure to the state employee's appointing authority.

This section has been cited in at least two recent Commission cases which have involved a public employee who has had official dealings with third parties while simultaneously having private dealings with these same parties. *See In re Keverian*, 1990 SEC 460; *In re Garvey* 1990 SEC 478. Specifically, *In re Keverian* 1990 SEC 460, 462 stated the reasons why §23(b)(3) is implicated whenever a public employee has a private relationship with a third party:

> In the Commission's view, the reason for this [§23(b)(3)] prohibition is two fold: first, such conduct raises questions about the public official's objectivity and impartiality. For example, if lay-offs or cut-backs are necessary, an issue can arise regarding who will be terminated, the subordinate or vendor who has a significant private relationship with the public employee, or another person who does not enjoy any such relationship. At least the appearance of favoritism becomes unavoidable. Second, such conduct has the potential for serious abuse.

A §23(b)(3) disclosure is necessary whenever there exists a potential for serious abuse of a public position by a public employee. This potential for serious abuse need not involve any financial interest on the part of the other party.

You maintain that you can no longer influence the settlement of the litigation and would therefore argue that no "appearance" of a conflict of interest will arise requiring your disclosure. However, we find that, because the settlement has now been challenged, and because you are required to continue having overall responsibility for the matter, an appearance of a conflict of interest arises if you were to contact an interested federal agency for

employment.

This conclusion is based upon the fact that it may appear that you would somehow act in a manner designed to place your own interests ahead of those of the Commonwealth, even if, in fact, no such bias exists. For example, a situation might arise where the federal government agency wishes to settle the litigation as to a challenger, but the Commonwealth's interests require further actions. It could appear that you might agree with the federal agency's assessment in an effort to curry favor with the very people with whom you are seeking employment. Again, this results even if no financial interest is present. Consequently, a §23(b)(3) disclosure is necessary in order to dispel any appearance of a conflict of interest.

You should also be aware that, while the §6 disclosure requirements are triggered at the point of negotiations for a specific job, *see Commission Advisory No. 14*, the point at which an appearance of a conflict of interest arises for §23(b)(3) purposes is at the moment that you contact, for employment, an interested federal agency while you are responsible for any aspect of the conduct of the litigation.

Please also be aware that §23 has application to you whenever you must officially participate in matters involving persons or organizations with whom you have recently terminated negotiations. *See Commission Advisory No. 14*. In addition, §23(c) prohibits the use or disclosure of confidential information to benefit a private interest. Confidential information is any information which cannot be obtained through a public records request.

Finally, certain restrictions will apply to your activities after you leave state service. Those restrictions are found in G.L. c. 268A, §5. You should make an additional opinion request if you seek guidance on §5.

CONCLUSION:

In summary, based upon the facts you have provided to this Commission, a §6 disclosure is not necessary if you negotiate for employment with a federal agency unless (i) that agency has a financial interest in, or is actively pursuing, the litigation in question, or (ii) the agency's hiring procedures are substantially controlled by an agency described in (i) above. We find, for example, that no §6 disclosure is necessary if you were to negotiate for employment with a United States Attorney's Office even though the Department has a financial interest in the litigation unless the United States Attorney's Office in question is actively involved in pursuing the litigation. However, a §6 disclosure is necessary if you begin negotiations with either Agency X or the Department.

Further, a disclosure under §23(b)(3) would be required whenever you contact, for employment, a federal agency which is a party to, or has some other interest in, the litigation, regardless of whether the agency has a financial interest. We find, for example, that Agency X and the Department have such an interest.[6/]

On the other hand, neither §6 nor §23(b)(3) is implicated where (i) the settlement agreement is finally approved by the Courts and/or no legal challenges or appeals remain; or (ii) you contact a federal agency which has no interest (financial or otherwise) in the outcome of the lawsuit, including a United States Attorney's Office which has had no involvement with the litigation.

Date Authorized: February 19, 1992

[1/]"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[2/]"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

[3/]Although this Commission has held in previous opinions that municipalities and municipal agencies are "business organizations" within the meaning of §6, *see, e.g., EC-COI-81-56; 81-62; 82-25; 85-67; 89-2; 90-4; 90-8*, other governmental agencies apparently are not considered "business organizations." For example, while municipalities are established for the purpose of conducting business, other public entities (the Commonwealth or its agencies, for example) appear not to be so established. *See G.L. c. 40, §1*, which establishes that

cities and towns are "bodies corporate." *See also*, *Attorney General Conflict of Interest Opinion No. 613*, February 5, 1974. *Cf. The Preamble to the Constitution of the Commonwealth of Massachusetts*, which establishes the Commonwealth as a "body politic [ ] formed by a voluntary association of individuals: it is a social compact"; *Attorney General Conflict of Interest Opinion No. 30*, April 25, 1963 (state agencies are not business organizations within the meaning of §6). However, because the present opinion does not concern the meaning of a business organization, we need not reach any conclusion on the meaning of any such distinctions.

[4/] Nothing in this opinion should be construed as holding that the various subsidiaries, divisions, or the like, of a corporation should be treated as distinct and separate entities for purposes of negotiating for prospective employment. For example, the Commission would conclude that a state employee who is participating in a matter involving one of General Motors' wholly-owned manufacturing subsidiaries must observe the §6 disclosure and determination procedures if he is simultaneously negotiating for employment with another division of the same company. This is because the parent company is a person within the meaning of this section. On the other hand, various governmental agencies can be treated as separate and distinct entities within the definition of an "organization." The Commission finds that the public interest is not injured by establishing a distinction between private corporations and agencies of the federal government for purposes of the §6 employment negotiation context.

[5/] Nothing in this opinion should be construed to find that a governmental agency which has branches in different jurisdictions can be further distinguished by locale or internal division. For example, if Agency X is one agency which triggers the application of §6 in your case, we would find that it makes no difference whether your work distinctly involved only one branch or division of Agency X, or its main office in Washington. The entire agency would be considered a single organization for the purposes of §6. Similarly, unless it is clear that the [name deleted] Division of the Department is a distinct and separate agency from the Department itself (that is, unless the Department does not have substantial control over the hiring within the Division), the entire Department will be treated as a single organization for purposes of §6.

[6/] To the extent that a §23 disclosure is necessary once you contact the agency anyway, you may choose to file a §6 public disclosure. The §6 disclosure would require your appointing authority to provide you with written guidance as to your continued participation in the litigation. A §23(b)(3) disclosure would not require your appointing authority to provide that guidance.